Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1506

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Petitioners,

—*v.*—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Petitioner,

—*v.*—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

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TABLE OF CONTENTS

	Page
Statement	1
Facts	2
Questions Presented	3
POINT I — The Petitioners' Complaints do not allege a cause of action for deprivation of due process and equal protection pursuant to the Fifth and Fourteenth Amendments of the United States Constitution	4
POINT II — The Petitioners' Complaints do not allege a cause of action for deprivation of due process and equal protection pursuant to the New York State Constitution	7
POINT III — The authority cited by Petitioners does not support their position	10
CONCLUSION — The Petition for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Fourth Department should be denied	17
Appendix:	
Opinion of Appellate Division of Supreme Court of State of New York, Fourth Department	1a
Concurring Opinion of Goldman, J.	2a
Judgment of Supreme Court, Onondaga County, Fisher, etc., et al. v. City of Syracuse et ano.	6a
Judgment of Supreme Court, Onondaga County, Bluman etc. v. City of Syracuse et ano.	8a
Opinion of Special Term of Supreme Court, Onondaga County	10a

Page

Citations:

Cases:

Bauch v. *City of New York*, 21 N.Y.2d 599, cert. den. 393 U.S. 834 6

Bucho Holding Co. v. *Temporary State Housing Rent Comm.*, 11 N.Y. 469 6

City of Buffalo v. *J. W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 NE2d 895 ..... 7, 8, 9, 14, 15, 16

City Service Oil Co. v. *City of New York*, 5 N.Y.2d 110 10

Conroy-Prugh Glass Co. v. *Commonwealth of Pa. Dept. of Transportation*, 298 A2d 672 (1972) 15

Danforth v. *U.S.*, 308 U.S. 271, 84 L.Ed. 240, 60 S.Ct. 231 ..... 5, 6, 9

Empire Construction, Inc. v. *City of Tulsa*, 512 P2d 119 (Okl. 1973) 16

Fifth Ave. Coach Lines, Inc. v. *City of New York*, 11 N.Y.2d 342 (1962) 7

Foster v. *Scott*, 136 N.Y. 577 7

Fram v. *City of Boston*, 292 N.E.2d 356 (1973) 15

Hazelton Redevelopment Authority v. *Hudock*, 281 A2d 914 (1971) 16

Klopping v. *City of Whittier & Sarff* v. *City of Whittier*, 8 Cal 3d 39, 104 Cal Rptr 1, 500 P2d 1345 (1972) 12, 13, 14, 15

Knox v. *Lee*, 79 U.S. 457 4

Laycock v. *Kenney*, 270 F2d 580 cert. den. 361 U.S. 933 ... 4

Levine v. *City of New Haven*, 294 A2d 644 (1972 Superior Ct. Conn.) 10, 11, 12

Luber v. *Milwaukee County*, 47 Wis.2d 271, 177 N.W. 2d 380 (Wisc. 1970) 11

Page

New Jersey Sports & Exposition Authority v. *McCrane*, 292 A2d 580 (Law Civ. 1971), Aff'd. 61 N.J. 1, 292 A2d 545 (1972) 16

People v. *Adirondack*, 160 N.Y. 225, Aff'd. 176 U.S. 335 ... 4

People v. *Priest*, 206 N.Y. 274 4

Police Dept. of the City of Chicago v. *Mosley*, 408 U.S. 92, 92 S.Ct. 2286 (1972) 6

Schnieder v. *State*, 187 N.E.2d 172 (1971) 12

Selby Realty Co. v. *City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P2d 111 (1973) 12

Shepard v. *Village of Skaneateles*, 300 N.Y. 115 10

Surety Savings & Loan Assoc. v. *State Dept. of Transportation*, 195 N.W.2d 464 (1972) 12

Trager v. *Peabody Redevelopment Authority*, 367 F.Supp. 1000 (D.C. Mass. 1973) 6

U.S. Dept. of Agriculture v. *Moreno*, 409 U.S. 1036, 93 S.Ct. 2821 (1973) 6

Weinandt v. *City of Appelton*, 207 N.W.2d 673 (1973) 11

Wilson v. *Long Branch*, 27 N.J. 360, 142 A2d 837 (1958) ... 16

Statutes:

Fourteenth Amendment of the United States Constitution 16

Fifth Amendment of the United States Constitution . 6, 16

Article 1, Section 7, New York State Constitution 6, 7

Article 1, Section 6, New York State Constitution 7

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STATEMENT

This appeal consolidates two actions brought by property owners against the City of Syracuse and The Syracuse Urban Renewal Agency for damages. In both actions, a motion to dismiss was brought pursuant to CPLR Section 3211. The

Supreme Court, Onondaga County, having found the cases to present common questions of law and fact, considered the motions together. This Court rendered a decision dismissing both complaints. Judgments of dismissal were entered on May 24, 1974, in the Office of the County Clerk of Onondaga County pursuant to an Order of the Supreme Court, Onondaga County (Roy, J.) dated and entered May 15, 1974. This case is reported in 78 Misc.2d 124, 355 N.Y.S.2d 239. Notices of appeal were filed in both actions on June 3, 1974, in the Office of the County Clerk of Onondaga County. The opinion of the Appellate Division, dated December 12, 1974, affirming the lower court decision is reported in 46 A.D.2d 216, 361 N.Y.S.2d 773. The Court of Appeals of the State of New York denied Petitioners' motion for leave to appeal by an order dated March 19, 1975.

FACTS

Plaintiffs-Petitioners are parties in interest to real property situated within the Syracuse Neighborhood Development Program. This Urban Renewal area encompasses 101 blocks within the City of Syracuse and contains over 1600 individual parcels of land. The Respondent, City of Syracuse, is the governing body and the Syracuse Urban Renewal Agency is the department designated to carry out the functions of Urban Renewal established pursuant to Article 15(a) of the General Municipal Law of the State of New York.

Petitioners have commenced an action against the Defendants-Respondents for damages based on a constitutional claim. They allege that as a result of Urban Renewal activities carried out by the Respondents pursuant to Section 503 and 503(a) of the General Municipal Law of the State of New York, the area surrounding Petitioners' property has suffered a condemnation blight. They further allege that the effect of such a blight has caused Petitioners to lose rental income; incur excessive expense for insurance premiums; incur expense in protection of property from vandalism; and a reduction in property value.

In their complaints, Petitioners allege the following acts on the part of Respondents. In 1962 the preliminary proposal for an urban renewal project, which would affect the area where the subject property is located, was commenced. In April 1964 the Syracuse Common Council approved the sponsorship and application for federal funding. In October 1966 the Common Council approved a partial acquisition for the purposes of implementing the plan in the area where the subject properties were located. Petitioners further allege that during this period the activities of the Urban Renewal Agency were the subject of frequent publicity in the newspapers in Syracuse and the subject of correspondence and conferences between the parties to this action. Pursuant to the plan, the Respondents have acquired a number of parcels in the area.

The Petitioners have based their claim on a novel constitutional argument. They contend that the foregoing activities of the municipality, authorized by law pursuant to a public purpose, violate the due process and equal protection clauses of both New York State and the United States Constitution.

It is extremely important to note that the Petitioners emphasize there has been no taking of their property, either through *de jure* or a *de facto* (inverse) condemnation. Nor do the Petitioners seek to compel the Respondents to institute proceedings for the condemnation of their property. (Page 5 Petitioners' Brief). They do not attack the enabling statutes, §503 and 503(a) of the General Municipal Law.

QUESTIONS PRESENTED

Does a cause of action exist for damages sustained to property located within an Urban Renewal plan as a result of the activities of a municipality through its agency as alleged in Plaintiff-Petitioners' complaints, absent either a *de jure* or *de facto* (inverse) condemnation?

POINT I

THE PETITIONERS' COMPLAINTS DO NOT ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Petitioners contend that the actions of the Respondents in implementing the Urban Renewal plan amount to a deprivation of due process and equal protection pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment provides, ". . .nor shall private property be taken for public use, without just compensation". The Fourteenth Amendment, which makes the Fifth Amendment applicable to the States provides, ". . .nor shall any state deprive any person of life, liberty or property without due process."

The inherent sovereign right of eminent domain is well recognized. *People* v. *Priest*, 206 N.Y. 274, *People* v. *Adirondack R. Co.*, 160 N.Y. 225, Affd. 176 U.S. 335. This right is limited by the Mandates of the Constitution. In the U.S. Constitution, the Fifth Amendment provides the basis for compensation to a landowner for the taking of property for public use. But the rights afforded by the Fifth Amendment may only be invoked where there is a direct appropriation. *Laycock* v. *Kenney*, 270 F.2d 580 cert. den. 361 U.S. 933 (1960). This principle was first established in *Knox* v. *Lee*, 79 U.S. 457 where the Supreme Court stated that the Fifth Amendment was "never . . . supposed to have any bearing upon or inhibit laws that indirectly work harm or loss to individuals." 79 U.S. at 551. In the case at bar Petitioners seek to extend the due process clause of the Fifth Amendment to include recovery where there *has admittedly been no taking*. (P. 5 Petitioners' Brief).

Faced with similar situations, other claimants have argued that a reduction in value does in fact amount to a taking so as to require the application of Fifth Amendment rights. These

arguments have long been rejected on the authority of *Danforth* v. *U.S.*, 308 U.S. 271 where the Court held;

> A reduction or increase in the value of property may occur by reason of legislation for the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense (308 U.S. at p. 285).

Recent Federal Court decisions have rejected claims where the intrusions have been similar to those of Petitioners. In *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F.2d 955 (6th Cir. 1970) a property owner brought an action against a municipality for losses alleged to have been sustained in connection with the establishment of an Urban Renewal project which transformed the surrounding residential area into vacant and undeveloped land. The property owner alleged the value of its leasehold interest had been destroyed by activities of the municipality in establishing an Urban Renewal project. The District Court granted a motion to dismiss and the Court of Appeals affirmed. The Court held "that there had been no *taking* . . . within the meaning of the Fifth or Fourteenth Amendments requiring payment of just compensation." The Court further stated:

> The losses occasioned to the plaintiff were not the result of any intrusion or encroachment by the City upon the plaintiff's property . . . Action done in the proper exercise of governmental powers which do not directly encroach upon private property, though they may impair its use or value do not amount to a taking of such property within the meaning of the constitutional provisions that private property shall not be taken for public use without just compensation. (citations omitted)

The Court went on to say;

> When reduced to its essence, the issue presented upon this appeal is whether a property owner, having property adjacent to an urban renewal project, may maintain an action for compensation under the Fifth and Fourteenth Amendments of the Federal Constitution for deprecation in the value of his property by reason of the establishment of the project. This Court is of the opinion that he cannot.

In *Trager* v. *Peabody Redevelopment Authority*, 367 F. Supp. 1000 (D.C. Mass. 1973) the court states

> . . . the mere determination by a governmental authority that a particular area of real estate is "blighted" as an initial step in an Urban Renewal project is not a constructive taking. This is so even though the determination of blight has an adverse effect on the value of the property. The initial steps in any condemnation proceeding, although such steps diminish the value of the property concerned, themselves do not require compensation (citing *Danforth* v. *U.S.*, *supra*, and *Woodland Market Realty Co.* v. *City of Cleveland*, *supra*, among other cases)

Whether or not a petitioner claims a taking, or in an attempt to avoid the *Danforth* rationale, simply alleges damages, as in the case at bar; the Federal law requires the municipal actions to amount to a "taking" before there can be a deprivation of constitutional due process. Clearly on the facts of this case and on the authority cited, the petitioners have failed to establish a claim for compensation based on their Fifth Amendment rights.

With reference to a claimed denial of equal protection, the law only permits compensation for properties that are taken. This concept applies whether the taking is de jure or de facto (inverse). This classification of who is entitled to compensation is based on the mandate of the Fifth Amendment and Article 1, Section 7 of the New York State Constitution where both require a taking. The requirements of equal protection are met if a classification or distinction among classes has some reasonable or rational basis. See, *Police Dept. of the City of Chicago* v. *Mosley*, 408 U.S. 92, 92 S.Ct. 2286 (1972); *U.S. Dept. of Agriculture* v. *Moreno*, 409 U.S. 1036, 93 S.Ct. 2821 (1973). For decisions on the state level see *Bauch* v. *City of New York*, 21 N.Y.2d 599, cert. den. 393 U.S. 834, *Bucho Holding Co.* v. *Temporary State Housing Rent. Comm.*, 11 N.Y.2d 469.

POINT II

THE PETITIONERS' COMPLAINTS DO NOT ALLEGE A CAUSE OF ACTION FOR DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION PURSUANT TO THE NEW YORK STATE CONSTITUTION.

Article 1, Section 6 of the New York State Constitution provides that "no person shall be deprived of life, liberty or property without due process of law". Again recognizing the sovereign's right of eminent domain, we find that Article 1, Section 7 sets the appropriate constitutional remedy for those property owners affected by the exercise of the state's power. It provides that "(P)rivate property shall not be *taken* for public use without just compensation". See e.g. *Fifth Ave. Coach Lines, Inc.* v. *City of New York*, 11 N.Y.2d 342 (1962).

New York has long been what is referred to as a "taking" jurisdiction. That is, a Court must find either a de jure or de facto taking before it can award damages to a property owner. *Foster* v. *Scott*, 136 N.Y. 577. This rule was most recently reaffirmed in the landmark decision handed down in *City of Buffalo* v. *J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345 (1971). In *Clement* the Court stated;

> [a] de facto taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use. (citation omitted at p. 253).

Petitioners have taken pains to point out the fact that they do not claim either a de facto or de jure taking in the instant cases. (P. 5 Petitioners' Brief). They recognize that condemnation blight is not equivalent to a de facto taking in this State (P. 9 Petitioners' Brief).

As Judge Roy recognized in his Opinion below, the *Clement* case is dispositive of the issue raised in this appeal, (A. 16a), because it re-affirms the New York Rule that:

> "the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage,

> does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a *taking* so as to warrant awarding compensation." *Clement, supra*, p. 257.

For the purposes of this case, the rule is clear that no action can be brought for compensation unless there are acts on the part of the municipality which constitute a direct invasion or a legal restraint (*Clement, supra*, at Page 253).

The facts upon which the Court of Appeals decided *Clement* are important if we are to analyze and understand its full impact. Clement, a fee owner of property located within an Urban Renewal project, was notified in 1954 of the possibility of impending condemnation of his property. In 1957 Clement was advised that his property could be taken between 1960 and 1962. Clement was one of the world's largest printing companies and had extensive machinery located at the acquisition site.

Early in 1963, Clement was advised via letter that acquisition was scheduled for May, 1963. Removal of all equipment was completed by April of that year, however, the actual condemnation proceeding did not commence until February, 1967 (311 N.Y.S.2d 113).

The trial Court found the acts of the City constituted a de facto taking as of April, 1963. That holding was affirmed by the Appellate Division (34 A.D.2d 24, 31-32, 311 N.Y.S.2d 98, 106). The Court of Appeals modified and held that there was no de facto taking in 1963, but permitted claimant to establish the fair value of his property taken in 1967 as if it had not suffered the ill effects of condemnation. The Court recognized the debilitating effects of condemnation blight but held it would only be relevant after a taking had occurred as envisioned by Article 1, Section 7 of the State Constitution.

> " . . . condemnation blight relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits a realistic valuation of the condemned property in the subsequent de jure proceeding. *Clements*, supra at P. 255."

As Judge Roy stated in his opinion below:

> "It thus can be seen that condemnation blight is not a cause of action, but in reality is a rule of evidence of valuation of real property that has been the subject of a taking . . . (A 15a)."

There are many facts in the *Clement* case which were analogous to those alleged in the case at bar. Property values were drastically reduced, the area had fallen into disrepair, property was unrentable, but the owners still had to pay for taxes and insurance. The Court found this to be "condemnation blight" and was quick to point out the distinction between blight and a de facto taking. (*Clement* at p. 256).

It is this judicial recognition of the existence of condemnation blight which permits the use of *Clement* as authority in this case. The Court recognized the fact that oft times property owners fall into the situation that plaintiffs herein find themselves. But the Court held that only those activities which amounted to a de facto taking could give rise to a cause of action for damages. Condemnation blight was determined not to amount to a de facto taking and therefore would not support a distinct cause of action. The Court states the policy in this state is

> "to deny recovery in the absence of a substantial impairment of the claimant's right to use or enjoy the property . . ." *Clement*, supra, at p. 257).

In reaching its decision the Court cites *Danforth* v. *United States*, supra. The Court considered recent decisions in other states and examined public policy. The Court realized that public announcement of impending condemnation, while perhaps a leading factor in condemnation blight, far outweighs the resultant havoc if a policy of secrecy were followed (*Clements*, supra, at 256).

The holding in *Clement* demonstrates the Court's interpretation that the constitutional requirement for compensation reserves to the people the right to construct public improvements without paying the owners of private property for

incidental injury caused thereby. In *City Service Oil Co.* v. *City of New York*, 5 N.Y.2d 110 Judge Fuld speaking for a unanimous Court said:

> . . . Any loss resulting from the interference with an abutting owner's enjoyment of his property is *damnum absque injuria* and the owner must bear it . . . in this area of governmental action, what is best for the body politic in the long run must prevail over the interests of particular parties. See e.g., *Shepard* v. *Village of Skaneateles*, 300 N.Y. 115, 118, 89 N.E.2d 619, 620. The interference here complained of must be shouldered by the plaintiffs as one of the inconveniences to be borne by the individual for the large benefit of the community and the public in general.

It should be remembered that there were 1600 parcels located within this particular urban renewal project. Less than 25% were acquired. If all the remaining owners were permitted the relief sought by these plaintiffs, the urban renewal project would come to a halt. The Congress of the United Statess the State Legislature and the Syracuse Common Council all determined that the urban renewal program would be beneficial to the people of the City of Syracuse. Clearly this is the type of benefit to the community to which Judge Fuld was addressing himself.

POINT III

THE AUTHORITY CITED BY PETITIONERS DOES NOT SUPPORT THEIR POSITION.

Petitioners contend that the facts in *Levine* v. *City of New Haven*, 294 A.2d 644 (1972 Superior Ct. Conn.) are similar to those alleged in the present case; however, there are important differences which distinguish *Levine* from the case at bar. In *Levine*, the complaint alleged four grounds: (1) a taking without due process; (2) nuisance; (3) gross negligence; (4) interference with the right to sell property. The Court sustained the demurrer to the third count, but overruled the others. The Court found the first count to be founded on the theory of "inverse (de facto) condemnation. The Court admitted the thinness of plaintiffs'

second claim but was willing to afford him an opportunity to sustain it. The fourth claim was sustained because the Court found allegations of acts which would have interfered with the sale of a portion of the property. With the possible exception of the nuisance claim, the case would appear to be consistent with the New York Rule. In *Levine* the plaintiff claimed a de facto taking and direct interference with the right to sell the property. In the case at bar, plaintiffs do not make these allegations.

The Petitioners have extensively cited the case of *Luber* v. *Milwaukee County*, 177 N.W.2d 380 (Wisc. 1970) in support of their position. An examination of that case along with subsequent Wisconsin Supreme Court decisions will demonstrate that *Luber* does not support their positions.

In *Luber*, the *plaintiffs' property had been taken* by condemnation. Prior to the taking the Wisconsin Legislature had passed a statute allowing recovery for rent loss incurred in the year prior to the taking. The plaintiff argued that the limitation of one year was unconstitutional on the basis of the just compensation clause of the Wisconsin Constitution. The Supreme Court of Wisconsin agreed and held that the statute:

> "Insofar as it limits compensation for the taking of such interest is in conflict with the State Constitution . . . and sec. 32.19(4), stats, insofar as it limits compensation is invalid. *Luber*, 177 N.W.2d at 386."

The decision in *Luber* is predicated on the fact that a taking had been effected. Once property is taken then just compensation is required. In the present case, petitioners claim no taking. As such, even in Wisconsin they would not be entitled to damages. Subsequent to *Luber* the Wisconsin Supreme Court has reiterated its rule that a taking is a requisite to recovery. In *Weinandt* v. *City of Appelton*, 207 N.W.2d 673 (1973) the plaintiffs attempted to rely on *Luber* to support a claim for damages where there had been no taking. The Wisconsin Court stated:

> "In the Luber case, that portion of Sec. 32.19(4) limiting recovery of consequential damages for loss of rent in condemnation, was held unconstitutional because it conflicted with the just compensation requirements . . . There is no taking in this case, so the just compensation question is not present."

In *Surety Savings & Loan Assn.*, v. *State Dept. of Transportation*, 195 N.W.2d 464 (1972) the same Court stated:

> "Compensation would be required if a property right was so impaired as to amount to a taking of land . . . However, injury to property resulting from the exercise of the police power of the State does not necessitate compensation (citing *Luber* v. *Milwaukee County*, supra)."

See also *Schneider* v. *State*, 187 N.W.2d 172 (1971) for a similar analysis of *Luber* supra. It would appear that both Wisconsin and New York are "taking" jurisdictions in the final analysis.

Finally, Petitioners look to the case of *Klopping* v. *City of Whittier & Sarff* v. *City of Whittier*, 8 Cal 3d 39, 104 Cal Rptr 1, 500 P2d 1345 (1972) as support for their position.

As Petitioners recognized in their brief, the actions in *Klopping* were in inverse (de facto) condemnation. (P. 13 Petitioners' Brief). As such the case is clearly distinguishable from the instant case where no taking is alleged. The requisites for a taking and recovery in California are similar to those in New York. In a decision rendered after *Klopping*, the California Supreme Court when faced with a claim arising out of the exercise of eminent domain rights, said:

> "In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specifically affect the landowner to his injury. *Selby Realty Co.*, v. *City of San Buenaventura*, 10 Cal.3d 110, 109 Cal. Rptr. 799 514 P2d 111 (1973)."

From this restatement of the California Rule, it is clear that *Klopping* has not and was not intended to permit damages absent a taking.

Examination of the *Klopping* decision shows that the California Supreme Court was concerned with the same issue as was the Court of Appeals in *Clement*, namely the correct valuation of property once a taking has been effected.

The facts in *Klopping* are rather complex, but they must be analyzed to discern the import of the decision. Plaintiffs Klopping & Sarff owned properties which were designated for condemnation in May, 1965 and with the usual public announcements followed. In November, 1965, condemnation proceedings were commenced. In November, 1966, these proceedings were dismissed due to protracted litigation commenced by other property owners, however, the City announced its intention to resume condemnation proceedings if the suits could be settled. In July, 1967, both plaintiffs submitted claims for damages to the City. These claims were rejected and the actions appealed from were commenced. Subsequent to suit, both properties had been recondemned. Klopping's action proceeded to judgment and the Court held he should have claimed the damages in that suit and therefore dismissed his claim. Plaintiff, Sarff, filed his inverses condemnation suit in March, 1968 and in May of that year he lost his property through foreclosure and subsequently the formal condemnation proceeding was commenced. The issue before the Court was whether Sarff could maintain his action for the decreased property value due to the debilitating effects of the condemnation announcements after the property had been taken.

At the outset the Court notes that the actions of the municipality did not constitute condemnation blight. (*Klopping* 104 Cal. Rpt. at p. 5). The Court recognizes that before damages can be awarded a taking is required.

> "Plaintiffs seek to recover under inverse condemnation, one of the two basic procedural devices for insuring that the constitutional proscription that '(p)rivate property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . .' is not violated. (Cal. Const. art. I §14.) The other procedure

is eminent domain, the significant difference being that in the latter the public authority takes the initiative whereas in the former it is the property owner who commences litigation." (*Klopping*, 704 Cal. Rpt. at p. 5).

The Court then goes on to cite with approval the decision in *City of Buffalo* v. *J.W. Clement Co.*, supra, and its recognition that a de facto taking requires a "physical invasion or direct legal restraint". (*Klopping* 104 Cal. Rpt. at 7).

The Court never decides whether there was a de facto taking in the case because plaintiffs were at a point in the litigation subsequent to a formal condemnation proceeding. The Court frames the issue thusly:

> ". . . a fundamental difference arises between the relief sought in de facto taking situations and that sought here. In the former the owner claims his property has been *taken* on the earlier date; (emphasis theirs) thus all decline in value after that date is chargeable to the condemnor. This would include damages wholly unrelated to the pre-condemnation activity of the public agency . . . . In the instant case, however, plaintiffs do not contend that the subject properties should be treated as if they were actually condemned on either May 11, 1965, or July 7, 1966 . . . . Rather plaintiffs submit that any decrease in market value caused by the pre-condemnation announcements should be disregarded and that the property should be valued without regard to the effect of the announcements on the property." (104 Cal. Rpt. at 7).

It is clear from this statement that the Court was simply concerned with the value to be placed on the property in the condemnation proceeding. The Court was persuaded that public policy demanded disclosure of impending condemnation and therefore tempered its ultimate decision by applying a rule of reasonableness on the part of the municipality. (104 Cal. Rptr. 11).

The Court held that where the condemnor acts unreasonably in issuing pre-condemnation statements or by other oppressive conduct, a claimant will be permitted to offer proof of the diminished value of the property due to these unreasonable activities. As such *Klopping* establishes a rule of evidence. It is

of some note that the rule in *Klopping* does not appear to go as far as that expressed by the New York Court of Appeals in *Clements* where the Court held when damages are assessed in the condemnation proceeding:

> ". . . The Claimants property should be evaluated . . . on its value except for such affirmative value-depressing acts of the appropriating sovereign. *Clements*, supra 28 N.Y.2d at 258."

From a review of the cases cited in support of Petitioners' position, there appears to be no authority to support their claim.

Respondents research would indicate that when other jurisdictions have been faced with similar claims, the Courts have unanimously rejected those claims.

In *Fram* v. *City of Boston*, 292 N.E.2d (1973) the Supreme Judicial Court of Massachusetts found the following facts alleged in plaintiff's complaint: his land was within a designated urban renewal area; following announcements of condemnation intentions many tenants vacated; the property was subject to being vandalized; all of which led to plaintiff's financial damage.

A motion to dismiss was sustained by the Trial Court and the Supreme Court affirmed. The Court first required there be a "taking" before damages could be awarded. The allegations of the complaint "clearly failed to show a taking in any sense". The Court further examined the policy behind its decision:

> "The circumstances surrounding urban renewal and urban redevelopment require advance planning and disclosure and public announcements of proposed action which results in decreases in property values are not by themselves compensable takings (292 N.E.2d at 359)."

In Pennsylvania the Commonwealth Court has stated:

> "The approval and funding of an urban renewal or redevelopment project by governmental authority followed by notices to and negotiations with affected property owners were not in themselves sufficient to establish a substantial interference with one's use and enjoyment of his property as to amount to a de facto 'taking' or compensable injury within the meaning of the Eminent Domain Code." *Conroy-Prugh*

Glass Co., v. *Commonwealth of Pa. Dept. of Transportation*, 298 A2d 672 (1972) citing *Hazelton Redevelopment Authority* v. *Hudock*, 281 A2d 914 (1971).

In New Jersey, the case of *New Jersey Sports & Exposition Authority* v. *McCrane*, 292 A2d 580 (Law Civ. 1971) Aff'd 61 N.J. 1, 292 A2d 545 (1972) held that the mere enactment of a statute and the stipulation by counsel as to the projected site for the complex do not constitute a "taking" of property in the constitutional sense. In *Wilson* v. *Long Branch*, 27 N.J. 360, 142 A2d 837 (1958) it was held that a declaration of blight does not itself constitute a "taking" for which compensation is required.

In *Empire Construction, Inc.* v. *City of Tulsa*, 512 P.2d 119 (Okl. 1973), the plaintiff alleged that his property would be condemned sometime in the future by the municipality. He further alleged that the City had precluded him from making any economically prudent productive use of the property and that by retention of the plan without implementation for such unreasonable length of time (10 years), the defendant City had frozen the property in a state of economic unproductivity and a "condemnation-related blight" which the plaintiff characterizes as an interference with its beneficial use and with its power of disposition, all of which constitutes a taking without just compensation contrary to the Oklahoma Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. In reaching its decision the Oklahoma Supreme Court cited the *Clement* case, and recognized that the New York Court of Appeals had distinguished between a de facto taking and a condemnation blight. The Court utilized this distinction for the purposes of determining whether or not a constitutional taking had been shown and concluded that

> "Plaintiffs' petition as amended does not set forth facts sufficient to state a cause of action in inverse condemnation for the taking or damaging of its property under the Oklahoma Constitution and statutes, nor under the United States Constitution. (512 P.2d at 124)."

It is clear from the above cited cases that there is no trend in any of the jurisdictions to permit a cause of action based upon facts as alleged by the Petitioners herein.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT SHOULD BE DENIED.

Dated: June , 1975

Respectfully submitted,

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APPENDIX

Opinion of Appellate Division, Fourth Department, 46 A.D.2d 216, 361 N.Y.S.2d 773

Donald M. Fisher et al., Appellants, v. City of Syracuse and Syracuse Urban Renewal Agency, Respondents. Appeal No. 1.

Sidney Bluman, Individually and as Executor of the Last Will and Testament of Isabel Hurwitz, Deceased, Appellant, v. City of Syracuse and Syracuse Urban Renewal Agency, Respondents. Appeal No. 2.

Supreme Court, Appellate Division, Fourth Department.

Dec. 12, 1974.

Before:

Moule, *J.P.*, and
Cardamone, Simons, Mahoney and Goldman, *JJ.*

Per Curiam:

Appellants seek damages for the diminution in value of their properties and for the increased expense of maintaining them which they allege result from the acts of the City of Syracuse.

The properties are located within an area approved for urban renewal as a part of the City's General Neighborhood Renewal Plan. They were subsequently designated for acquisition by the Common Council. Although the plan was adopted more than 10 years ago, the properties have not been taken and it is claimed that substantial damage has resulted during the interim from this threat of condemnation. Special Term held that in the absence of a "taking" the appellants were not entitled to damages from

the City and dismissed the complaints for failure to state a cause of action (78 Misc.2d 124, 355 N.Y.S.2d 239). We affirm that decision (see Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240; City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895; and cf. opinion at the Appellate Division, 34 A.D.2d 24, 311 N.Y.S.2d 98). Furthermore, without an actual or *de facto* taking of the property the appellants are not entitled to be compensated for damages under the due process and equal protection clauses of the State and Federal Constitutions (see Sayre v. City of Cleveland, 6 Cir., 493 F.2d 64). The judgments should be affirmed.

Judgment affirmed without costs.

MOULE, *J.P.*, and CARDAMONE, SIMONS and MAHONEY, *JJ.*, concur.

GOLDMAN, *J.*, concurs in the following Opinion.

GOLDMAN, *Justice* (concurring):

I concur in affirmance but feel constrained to point out a a substantial wrong which has been visited upon appellants. The facts are not in dispute.

The properties owned by both plaintiffs are situated within a 101 block area within the City of Syracuse designated as the Syracuse Hill Neighborhood Development Program and there are over 1,600 individual parcels of land within the area. In 1962 the Syracuse Urban Renewal Agency, a Department of the City, commenced a comprehensive urban renewal study and made renewal plans for the area in question. The Common Council of the City approved an ordinance authorizing an application by the

City to the federal government for a planning grant for the urban renewal project. On September 12, 1966 the Common Council approved an initial partial acquisition of properties. On October 14, 1966 the City submitted a plan of acquisition for a portion of the renewal area, which plan included the property of appellant Bluman but did not include the property of appellants Fisher. Although the City has acquired title to many of the properties in the area, no proceeding has been commenced to condemn appellants' properties and no compensation has been paid to them.

Special Term found that:

> "It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions."

In furtherance of the plan many buildings were demolished and others were boarded up in the immediate area where appellants' properties are located. Appellants brought these actions to recover damage for the diminution in property values because of the "condemnation blight" and also for the increased expense of maintaining the properties during this long period of activity by the City. Although there was no "taking", appellants contend that the refusal to grant them "just compensation" is a denial of due process and equal protection guaranteed by the Constitutions of the United States and the State of New York.

Special Term recognized the damages suffered by appellants and stated that the decision it must make was "harsh" in its effect on these property owners. Special Term felt bound, as we do, by Article I, section 7(a) of the State Constitution which specifically limits "just compensation" to property "taken". Our highest State court has clearly recognized this limitation in several decisions and particularly in City of Buffalo v. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904. No good purpose can be served by citation of the numerous Supreme Court decisions which deal with the question of "just compensation". Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 is supportive for the determination by Special Term. That case succinctly presents the limitations which constitutionally restrict compensation for "taking" stating, at page 285, 60 S.Ct. at page 236, that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. *They cannot be considered as a 'taking' in the constitutional sense*" (emphasis supplied). Special Term asserted that although it was "sympathetic to the plight of the plaintiffs • • • the principle of *damnum absque injuria* prevails". An eminent jurist of our State, Justice Howard T. Hogan, who has for many years presided almost exclusively over condemnation and appropriation cases, expressed my position on this principle when he wrote in Matter of County of Nassau [Lido Blvd.], 71 Misc.2d 554, 562 336 N.Y.S.2d 566, 575 that "[t]he doctrine of *damnum absque injuria* to me has always been an immoral, illogical concept and should be declared illegal". It is of little comfort to tell these appellants that, "notwithstanding the

agreed fact that the City has dragged its heels for an inordinately long time (now ten years and into the indefinite future), you have been damaged but that damage is without wrong. True, your properties are now in a vast waste land, without tenants, neither desirable for residential nor commercial use, deteriorating daily but, unfortunately, under the present state of the law you have no recourse". This was the basis of our decision in City of Buffalo v. Clement Co., 34 A.D.2d 24, 28-32, 311 N.Y.S.2d 98, 102-107, which the Court of Appeals held (28 N.Y.2d 241, 257, 321 N.Y.S.2d 345, 358, 269 N.E.2d 895, 904, *supra*) is not the law in this State.

The sole purpose for this writing is the hope that the Legislature will consider the dilemma of these property owners, and literally hundreds of others similarly affected during these days of urban renewal, and will adopt legislation recommending amendment of our State Constitution. Substantially more than half of our sister states, among which are such significant jurisdictions as California, Illinois, Massachusetts and Pennsylvania, now make provision for compensation for property "taken or damaged". The New York State Constitutional Convention of 1967 proposed a new Constitution which contained in Article 1, section 7(a) the provision that "[P]rivate property shall not be taken or damaged, as such latter term is defined by law, without just and timely compensation". Since the refusal of the electorate to adopt the new Constitution, the Legislature has been taking action on these provisions on which there is a consensus as to their desirability. I respectfully suggest to the Legislature that the subject of this opinion is a matter which should be given prompt and favorable consideration.

Judgment Appealed From—Fisher Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #1

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, Deceased; ROSLYN MILLER; BERNICE GOLD and PHILIP ADLER,

Plaintiffs,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiffs, appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Judgment Appealed From—Fisher Case

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

ADJUDGED, that the defendants have judgment against the plaintiffs dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Judgment Appealed From—Bluman Case

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Case #2

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, Deceased,

Plaintiff,

—v.—

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Defendants.

A motion having been made by the defendants for judgment dismissing the complaint in the above-captioned action pursuant to CPLR 3211, and the motion having regularly come on to be heard at a Special Term of this court on the 15th day of January, 1974, and the defendants appearing by Harold T. Limpert, and the plaintiff appearing by Raphael, Searles, Vischi & Sackman, Julius L. Sackman, as counsel, and the motion having been granted and a memorandum decision dated March 27, 1974, directing that the complaint in the above-entitled actions be dismissed and an order granting said motion having been filed and entered May 15, 1974,

Now, on motion of Harold T. Limpert, attorney for the defendants, it is

Judgment Appealed From—Bluman Case

ADJUDGED, that the defendants have judgment against the plaintiff dismissing the complaint.

Judgment signed this 24 day
of May, 1974.

/s/ JAMES D. GORHAM
Acting Onondaga County Clerk

Opinion of Special Term, Onondaga County, 78 Misc.2d 124, 355 N.Y.S.2d 239

DONALD M. FISHER *et al., Plaintiffs* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants.*

SIDNEY BLUMAN, Individually and as Executor of the Last Will and Testament of Israel Hurwitz, Deceased, *Plaintiff* v. CITY OF SYRACUSE and Syracuse Urban Renewal Agency, *Defendants.*

Supreme Court, Onondaga County

March 27, 1974

WILLIAM R. ROY, *Justice.*

The defendants in each of the above entitled actions have moved, pursuant to C.P.L.R. 3211 to dismiss the complaints on the ground that they fail to state a cause of action. Since both cases involve common questions of law and fact, this Court will consider them together.

In considering these motions to dismiss, the Court will apply the rules of liberal construction of the pleadings; Walkovsky v. Carlton, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6; C.P.L.R. 3026; the acceptance as true of the material allegations of fact contained in the complaints and the truth of any reasonable inferences that may be drawn therefrom; Garvin v. Garvin, 306 N.Y. 118, 116 N.E. 2d 73; and that if any cause of action can be spelled out from the facts alleged, the motion must be denied, Dulberg v. Mock, 1 N.Y.2d 54, 150 N.Y.S.2d 180, 133 N.E.2d 695.

The facts giving rise to the instant litigation are without dispute. The plaintiffs in each action claim to be owners or parties in interest to real property situated within a 101 block area within the City of Syracuse and known as the

Syracuse Hill Neighborhood Development Program. This is a designated urban renewal area and contains over 1,600 individual parcels of land.

Defendant, City of Syracuse, is the governing body and the Syracuse Urban Renewal Agency is the department delegated by the City to carry out the functions vested in the Agency which was established pursuant to Article 15A of the General Municipal Law of the State of New York.

A brief review of the history of the Syracuse Hill Neighborhood Development Program will be helpful in the determination of these motions.

Beginning in 1962 comprehensive urban renewal plans were commenced in the form of a general neighborhood renewal plan in the area in question.

In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant in connection with the above urban renewal project and thereafter received such grant for the study. The properties owned by the plaintiffs in both of the above entitled actions were within the planning grant area.

On September 12, 1966, the Common Council of the City of Syracuse approved an initial partial acquisition for purposes of the plan.

On October 14, 1966, the City submitted a plan of acquisition for another part of the renewal area, which plan included the property of the plaintiffs, Bluman, in the second action. It is conceded that at no time was the property of the plaintiffs in the first action ever included within the plan.

In June 10, 1969, the Common Council of the City of Syracuse changed the project from General Neighborhood

Opinion of Special Term, Onondaga County,
78 Misc. 2d 124, 355 N.Y.S.2d 239

Renewal Plan to Neighborhood Development Plan and this was approved by the Common Council of the City on June 22, 1969. It is undisputed that for more than ten years the above events and activities associated therewith were the subject of wide and frequent publicity in the news media in the City of Syracuse and were the subject of frequent correspondence and conferences between the parties in both of the above captioned actions.

In implementing the foregoing plans and authorizations the defendants have acquired title to many parcels located within the urban renewal area and to several parcels in each of the blocks located within the City, in which the plaintiffs' properties are located. Many buildings have been demolished in furtherance of the plan and others have been boarded up.

The plaintiffs, feeling aggrieved as a result of the action of the City and the Agency, commenced these actions by a summons and complaint dated October 5, 1973.

In each of the complaints the history of ownership of the property is alleged and the activities of the City and the Agency as set forth above were outlined.

The complaints in each action contain similar allegations with respect to the activities of the City. Both of the complaints contain the following paragraphs:

> "As a result of the inordinately long and dilatory tactics of the defendants, the vicinity of the plaintiff's property has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both

Opinion of Special Term, Onondaga County,
78 Misc. 2d 124, 355 N.Y.S.2d 239

> residential and commercial tenants have moved from the area, the plaintiff has lost substantial amounts of rental income, he has been placed in a special insurance pool which has forced him to pay excessive premiums, he has been compelled to expend monies to protect the property from vandalism, and his property has been drastically reduced in value."
>
> "By reason of the foregoing the plaintiff has been deprived of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Sections 6 and 11 of the New York State Constitution."

In the Bluman complaint there is an allegation that the property was designated for acquisition but that no proceedings were commenced to condemn the property, nor was any step taken to compensate the Blumans for the damage allegedly sustained by them.

The Fisher complaint contains an allegation to the effect that although their property was in the urban renewal area, no proceedings have been commenced to condemn the property nor has anything been done to compensate plaintiffs in that action for the damage allegedly suffered by them.

Thus, the only difference between the two actions is that in the Bluman case the property was designated for condemnation, but has not as yet been taken and in the Fisher case the property was not designated for condemnation.

It is the plaintiffs' contention, in both actions, and, as appears by the complaints, that as a result of the actions of the defendants, the vicinity of the plaintiffs' property

has suffered a "condemnation blight". This, they allege, has transformed the area into one which is highly undesirable for either residential or commercial purposes; it has become a high crime rate area where vandalism is rampant and where it is not safe to live or work. Plaintiffs further allege that tenants have moved from the area, resulting in loss of rental income. Further, plaintiffs claim that they have been forced to pay excessive insurance premiums and that they have been compelled to expend monies for the protection of their property from vandalism and that the properties have been reduced in value.

The plaintiffs contend that they should be compensated, because of the so-called condemnation blight, for loss of income from the properties, depreciation in value, and additional costs incurred in protecting the property from vandalism, as well as increased insurance premiums. They contend that the actions of the defendants amount to a constitutional deprivation of due process and equal protection of the laws pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

It is important to point out that in both of these actions the plaintiffs are not claiming that the defendants have *taken* their property, either by *de jure* or *de facto* (inverse) condemnation. Nor do they seek to compel the defendant to condemn the properties. As this Court reads the complaints, the plaintiffs claim that they should be compensated for damages sustained by them as a result of the activities of the defendants in creating what is referred to as a "condemnation blight" in the vicinity of their properties.

In order to understand and properly evaluate the complaints of the plaintiffs, it is necessary to examine the law in connection with condemnation and appropriation. As

was stated in City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241 at pg. 255, 321 N.Y.S.2d 345 at pg. 357, 269 N.E.2d 895 at pg. 903, ". . . 'condemnation blight' relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding." It thus can be seen that condemnation blight is not a cause of action, but in reality is a rule of evidence of valuation of real property that has been the subject of a taking in condemnation, *de jure* or *de facto*.

The Fifth Amendment to the U.S. Constitution provides, as pertinent to this decision, ". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment, so far as is pertinent to this decision provides, ". . . nor shall any State deprive any person of life, liberty or property, without due process; . . .". Article 1, § 6 of the New York State Constitution provides, as far as is pertinent to this decision, as follows: ". . . no person shall be deprived of life, liberty or property without due process of law."

It is in light of these provisions of the Federal and State Constitutions and upon the case law that we must determine whether the actions of the defendants, although concededly not constituting a "taking" of property in its accepted legal sense, i.e., *de facto* or *de jure* appropriation, give rise to a cause of action for diminution in property values and increase in costs of maintenance and protection of those properties.

The Fifth Amendment provides the basis for compensation for property taken for public use. This provision refers only to direct appropriations. Laycock v. Kenney,

9 Cir., 270 F.2d 580, cert. den. 361 U.S. 933, 80 S.Ct. 373, 4 L.Ed.2d 355 (1960), and was never supposed to have any bearing upon or inhibit laws that indirectly work harm and loss to individuals. Knox v. Lee, 79 U.S. 457, 20 L.Ed. 287 (1870).

Furthermore, as was stated in Danforth v. United States, 308 U.S. 271 at pg. 285, 60 S.Ct. 231 at pg. 236, L.Ed. 240 (1939), ". . . a reduction or increase in the value of property may occur by reason of legislation for or the beginning or a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

It thus can be seen that under the Federal law the actions of the defendants do not amount to a "taking". Inasmuch as these acts do not amount to a "taking", under the Federal law, then there can be no deprivation of constitutional due process. Danforth v. United States, *supra.*

In the landmark New York case of City of Buffalo v. Clement Co., *supra,* 28 N.Y.2d at pg. 257, 321 N.Y.S. at pg. 359, 269 N.E.2d at pg. 904, Judge Scileppi, after a review of authorities, stated the policy of the State of New York is:

> ". . . to deny recovery in the absence of a substantial impairment of claimant's right to use or enjoy the property at any time prior to the date of final appropriation. Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation."

In addition, the Court of Appeals of the State of New York has previously stated: "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation . . . or give him any right of action." Sauer v. City of New York, 180 N.Y. 27, 32-33, 72 N.E. 579, 580, aff'd 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1176.

Assuming the allegations of the complaints to be true, there is no question that the plaintiffs in each of the above entitled actions have suffered damages. It may very well be that the damages that the plaintiffs would be able to prove might far exceed the fair market value of the properties to which the owners might be entitled in condemnation proceedings. However, the mere fact that someone has suffered damage does not give rise to a cause of action, unless the cause of action has a legal basis. The items of damages alleged by the plaintiffs were not actually taken by the defendants. They are not "property" within the contemplation of the eminent domain clauses of the Federal or State Constitutions.

This Court is unable to find any case, Federal or State, which supports the theory upon which plaintiffs base their cause of action.

Plaintiffs, in their brief, cite the case of Luber v. Milwaukee County, 47 Wis.2d 271, 177 N.W.2d 380 (1970), in support of their position. That case involved the interpretation of a Statute which purported to limit the amount of rental loss which might be recovered in a condemnation case. The Court held in that case that the Statute was un-

constitutional insofar as it limited compensation for rental loss, stating that " . . . one's interest in rental loss is such as is required to be compensated under the 'just compensation' clause of Article 1, sec. 13, Wis.Const. sec. 32.19(4), Stats. . . .".

What the Court was determining in that case was that once you have determined what is "just compensation", any attempt to limit that "just compensation" would be unconstitutional.

The other cases cited by the plaintiffs in their brief involve instances of either *de jure* or *de facto* appropriation and did not involve the precise question here presented for determination by this Court. The case of Levine v. City of New Haven, 30 Conn.Sup. 13, 294 A.2d 644 (1972), cited by the defendant, involved a complaint which the Court determined to be one for inverse condemnation (a *de facto* taking). The case thus involved the question of whether the acts of the City of New Haven constituted a "taking" in the constitutional sense. That case differs from the above captioned cases in that there is no claim by either plaintiff that the acts of the defendants constitute a "taking".

It might be pointed out that once it has been determined that a "taking" has occurred, then all of the rights of the plaintiffs to constitutional due process must be observed. This necessarily involves notice to the property owner and an opportunity for him to be heard on the question of "just compensation".

Prior to a determination that property has been taken within the constitutional sense, that is by a direct appropriation, Laycock v. Kenney, *supra,* be it *de jure* or *de facto,* there is no constitutional deprivation of due process.

Danforth v. United States, *supra;* City of Buffalo v. Clement Co., *supra.*

Although the Court is sympathetic to the plight of the plaintiffs in these cases, it finds no constitutional or case authority in support of the causes of action alleged in the complaints. As harsh as it may be, the principle of *damnum absque injuria* prevails, and the complaints in each of the above entitled actions are, accordingly, dismissed on the ground that they fail to state a cause of action.